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No. 84-1287

In The
Supreme Court of the United States
October Term, 1984

LOUIS LIPHETE, et al.,

Petitioners,

vs.

MERRITT STIERHEIM, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

REPLY BRIEF OF PETITIONERS

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STATEMENT

Petitioners submit this Reply Brief pursuant to Rule 22.5 of the Supreme Court of the United States to address certain arguments raised by respondents in their Brief in Opposition to the Petition for a Writ of Certiorari.

ARGUMENT

Respondents have raised several new matters in their Brief in Opposition to the Petition for a Writ of Certiorari. They nonetheless fail to respond to important matters raised by petitioners, and instead attempt to obscure the issues presented in this case and the importance of this Court granting the writ of certiorari to review the judgment of Florida's courts.

Respondents have argued that no federal issue is involved, when the federal questions are absolutely paramount. Respondents maintain Florida's state courts acted on adequate and independent non-federal grounds when the only grounds which they can proffer are federal. In attempting to press the argument of adequate and independent state grounds, respondents claim for the state of Florida authority to classify and regulate alien immigrants in a manner contrary to federal policy. Moreover, respondents completely misconstrue federal immigration law, as it applies to petitioners.

Point I.

The Granting Of This Writ Is Of Vital Importance To Tens Of Thousands Of Aliens Lawfully Residing In South Florida.

Petitioners note that respondents do not dispute the importance of the case *sub judice*. To petitioners them-

selves, the Liphete family, their ability to own a home and properly care for it and their chance for equal treatment with other permanent residents of the state of Florida are of utmost importance. The rights of this one family, alone, however, are not solely at issue as this Court considers the appropriateness of granting this Writ of Certiorari. Petitioners' status as Cuban-Haitian Entrants is shared by approximately 130,000 aliens of Cuban and Haitian origin. The overwhelming majority of aliens in this category reside within the jurisdiction of Florida's Third District Court of Appeal.

The effect of the decision from which this writ is taken is to create a virtual subclass of tens of thousands of families expected to bear all of the burdens of permanent residence in the community but denied the benefits accruing to permanent residents.

The rule established in this and in previous Florida cases would also affect tens of thousands of other non-Cuban-Haitian Entrants whom the federal government has permitted to take up permanent residence but who are precluded from obtaining permanent residency in Florida by virtue of the decisions of Florida Courts.

Point II.

This Court Has Jurisdiction To Review This Case Under 28 USC Section 1257(3) (1982) Because Florida's State Courts Have Interpreted Federal Law Erroneously And Have Deprived Petitioners Of Important Federal Rights.

Petitioners have, from the initiation of this action, pressed their federal claims and demanded they be given equal protection and due process of law in having their application for homestead tax exemption treated like the

applications of other permanent residents of the state. See Petitioners' Appendix ("P.A.") at A8-A17. At each level of the appeal process, the constitutional and federal statutory issues were briefed and argued by petitioners and respondents. Under the facts of this case, the Florida courts necessarily had to decide that petitioners' federal rights were not infringed when, as Cuban-Haitian Entrants, they were denied the homestead tax exemption.

The Florida courts interpreted federal law in determining that petitioners' federal immigration status did not permit them to declare an intention to remain permanently in the United States. The Florida courts determined, contrary to *Elkins v. Moreno,* 435 U.S. 647 (1978), that unless an alien was a permanent resident within the meaning of the Immigration and Nationality Act he could not form the intent to remain in Florida. Only federal law can delimit the scope and status of an alien's right to remain permanently in the country. *Id.* Any claim by Florida's courts to make determinations concerning residency based upon federal immigration status, therefore, itself involves the state courts in the resolution of a crucial federal question.

It is a well settled principle of this Court that if petitioners raise federal questions and demonstrate that they did raise such questions,(1) it is not essential that the state's denial "shall have been put in direct terms". *New York, ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928). It is enough if "the necessary effect of the judgment has been to deny the claim." *Id.*

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(1) Petitioners, of course did raise the federal question at every instance, beginning in the complaint which initiated the action in Florida's court. P.A. at A8, A13-A16.

It is therefore difficult to comprehend respondents' position that no federal issue has been pressed or passed on.[2]

A. The Brevity Of The Decision Of The Court Below Does Not Exempt The Judgment From Judicial Review.

Respondent's argument that this Court cannot review the decision below because of its brevity and because it is a *per curiam* decision is a novel one in federal appellate practice. Petitioners' rights have been effected by the judgments of Florida's courts. This Court reviews judgments of lower courts and not necessarily written opinions and reasoning. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723 n. 7 (1982).

The record clearly establishes that the basis for the judgments of the Florida trial and appellate courts in this case was an erroneous interpretation of federal law contrary to this Court's decisions. In its *per curiam* affirmance, the Florida Third District Court of Appeal found controlling its recent decision in *Alcime v. Bystrom*, 451 So.2d 1037 (Fla. 3d DCA 1984) which held that only aliens with permanent resident visas or "green cards" could, as a matter of law, form the intent to reside in this country permanently (P.A. at A4). *Alcime* itself relied on and found controlling two Florida Supreme Court

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(2) In *Illinois v. Gates*, — U.S. —, 103 S.Ct. 2317 (1983), upon which respondents rely, this Court was confronted with a situation in which a petitioner, the state of Illinois, was raising arguments not heard or decided at any level before the matter reached this Court. That is not the case here. The federal issues were raised, argued, and necessarily decided at every stage of this litigation.

cases, *Juarrero v. McNayr*, 157 So.2d 79 (Fla. 1963) and *In Matter of Cooke*, 412 So.2d 340 (Fla. 1982). Similarly the trial court in this case found the same Florida Supreme Court cases controlling (P.A. at A5-A6). Both *Juarrero* and *Cooke* interpreted federal immigration law in a manner arguably contrary to this Court's decisions.[3] The Florida courts therefore, not only passed upon Federal claims in their judgment, they decided them erroneously and contrary to federal law.

Federal rights can be denied as well by a state court refusing to decide a federal question as by the state court's erroneous decision. For this reason, a state court's re-

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(3) In *Juarrero* v. *McNayr*, 157 So.2d 79 (Fla. 1963), Florida's Supreme Court necessarily looked to the federal provisions governing the admittance of Cuban political refugees to determine whether the Juarrero family could, as a matter of law, form the requisite intent to permanently reside in the state. Since the family was admitted only so long as political conditions in their homeland were such that refuge was warranted, the court found that they were unable, as a matter of federal law, to form the requisite intent to remain permanently in the state of Florida.

Similarly *In Matter of Cooke*, 412 So. 2d 340 (Fla. 1982), the Florida Supreme Court examined two claims at the request of the federal Fifth Circuit Court of Appeals. The first question addressed was whether certain 1968 statutory amendments to the homestead tax exemption had ended the requirement that an applicant be a permanent resident. That issue the Florida court did decide in the negative on the basis of state law. The second question was whether Cooke, who had entered the U.S. as a Canadian tourist, had the right to claim the exemption under state law. Florida's highest court examined the provisions of the Federal statutes which defined the tourist visa. Indeed, the Supreme Court of Florida explicitly accepted the determination of a United States Court concerning Cooke's legal capacity under federal law as dispositive, then proceeded to reaffirm the decision in *Juarrero, supra*, that such a legal incapacity under federal law effectively barred an alien from claiming the exemption under state law.

fusal or failure to articulate denial of a federal claim is just as reviewable as an express decision. *Chambers v. Mississippi,* 410 U.S. 284, 290 n. 3 (1973); *Street v. New York,* 394 U.S. 576 (1969); *New York, ex rel. Bryant v. Zimmerman, supra.* The highest state court does not defeat review merely by writing brief opinions. Today's appellate courts are frequently confronting workloads that virtually mandate extremely brief opinions. This does not affect the jurisdiction of this Court to review such judgments. *Lawrence v. State Tax Commission,* 286 U.S. 276, 282 (1932); *Super Tire Engineering Co. v. McCorkle,* 550 F.2d 903 (3rd Cir., 1977), cert. denied 434 U.S. 827.

Respondents would have this Court adopt a rule which would allow no review of a *per curiam* decision. This is a rule of the Florida Supreme Court, but this Court regularly reviews *per curiam* affirmances and must do so to protect federal rights. Indeed, this Court implicitly rejected respondents' position in *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967). In *Nash,* petitioner had claimed that a decision of a Florida administrative board had violated his constitutional rights, federal statutory rights, and the supremacy clause of the United States Constitution. Nash lost before an administrative agency and petitioned an intermediate Florida Appellate court for review. The Florida appellate court denied certiorari *per curiam.* This precluded any review by Florida's Supreme Court. Nevertheless, this Court accepted certiorari because of the federal rights affected. *Id.,* at 237.

B. There Were No Independent Non-Federal Grounds Upon Which Petitioners Could Be Found To Lack The Legal Capacity To Form The Intent To Reside Permanently In Florida And Thus Be Ineligible For The Florida Homestead Tax Exemption.

Petitioners do not question Florida's authority to limit the homestead tax exemption to permanent residents of the state. Nor do petitioners challenge that part of the Florida Supreme Court decision in *Juarrero v. McNayr,* 157 So.2d 79 (Fla. 1963), which determined that aliens with only temporary permission to remain in the country could not form the requisite intent to reside permanently in the state as a matter of law. Petitioners challenge only the refusal of Florida to extend the homestead exemption to Cuban-Haitian Entrants who have been permitted to remain in this country indefinitely and thus have the capacity to form such an intent.

Respondent's claim that there was an adequate independent state ground for that refusal is wholly without merit. Under any of the tests articulated by this Court there is no independent and adequate state ground claim. This Court recently established a clear rule for determining whether there was an adequate and independent state ground upon which a decision was based:

> . . . when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Michigan v. Long, — U.S. —, 103 S.Ct. 3469, at 3476 (1983). See also *Enterprise Irrigation District v. Farmers Mutual Canal Company*, 243 U.S. 157 (1917) (If the asserted non-federal ground is inextricably interwoven with federal law then this Court has jurisdiction.); *NAACP v. Alabama*, 357 U.S. 449 (1958) (This Court's jurisdiction is not defeated by a claim of an adequate and independent non-federal ground where that claim is without fair or substantial support.); *Xerox Corporation v. Harris, County, Tex.*, — U.S. —, 103 S.Ct. 523 (1982) (Where a decision on a federal question is an underlying prerequisite to reaching a determination then jurisdiction is clear even if the state court cites no federal law, or constitutional provision).

In this case and the decisions upon which the Florida courts relied below, federal immigration law is necessarily interwoven with state law. This is necessarily so since,

> . . . it is the business of the political branches of the Federal Government, rather than the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens.

Mathews v. Diaz, 426 U.S. 67, at 84 and 85 (1976).

This rule certainly applies to restrictions on an alien's ability to permanently reside in this country. Respondents themselves concede as much by arguing only the federal ground in the substantive part of their brief when arguing against petitioners' legal capacity to form the intent to permanently reside in this country. See Respondent's Brief ("Res. Br.") at 8-9.

C. This Court's Decision In Elkins v. Moreno, 435 U.S. 647 (1978), Reinforces Petitioners' Position That The Key Issue Is Federal.

Elkins, supra, contrary to Respondents' contention in no way conflicts with this jurisdictional rule. The very fact that this Court undertook and did decide whether the Morenos had the legal capacity to declare themselves permanent residents of the state of Maryland settles the issue of whether this question is a federal one. This Court's remand in *Elkins* to Maryland's Court of Appeals on the question of whether there was any other element of domiciliary in the laws of Maryland which the Morenos had not fulfilled, came after this Court's determination of the effect of the Morenos' federal immigration status. The remand to the Maryland courts was simply to decide, in light of the federal determination of status, whether Maryland's other criteria for domicile might prevent the Morenos from achieving "in state status". *Toll v. Moreno,* 397 A 2d 1009 (Md. 1979). In any case an assertion by any state that it had the authority to impose greater restrictions on aliens than the federal government had imposed would run afoul of the supremacy clause. *Toll v. Moreno,* 458 U.S. 1 (1982).

Point III.

The Decision Below Denying Homestead Exemption To Cuban-Haitian Entrants Does Conflict With Toll v. Moreno, 458 U.S. 1 (1982), Elkins v. Moreno, 435 U.S. 647 (1978), And Vlandis v. Kline, 412 U.S. 441 (1973), As That Case Has Been Modified By Subsequent Decisions.

The question in *Elkins,* was whether aliens with a "G-4" visa could be domiciles of Maryland. This Court decided that, as a matter of federal law, "G-4" aliens did have the legal capacity to form a good faith intent to re-

side permanently in the United States and Maryland and that all aliens lawfully in this country have this legal capacity unless it is withheld from them by some restriction placed on their entry.

Respondents, directly opposite to the conclusion of this Court in *Elkins,* still contend that only holders of permanent resident visas or "green cards" can reside permanently in this country as a matter of federal law. (Res. Br. at 8). However, petitioners here, like the Moreno family in *Elkins* assert that their federal status as Cuban-Haitian Entrants, although not a grant of permanent resident status, does not preclude them for consideration as permanent residents of Florida.[4]

The judgment of the Florida courts also conflicts with *Toll v. Moreno,* 458 U.S. 1 (1982) where this Court decided that it was impermissible for a state to place a greater burden on the alien's status than the one placed there by

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(4) This Court in *Elkins, supra,* made it clear that there were different categories of aliens without "green cards" who could lawfully intend to reside in the United States indefinitely. Maryland erred by treating aliens without the permanent visa as being legally incapable of forming the intent to permanently reside.

Just as Maryland officials failed to distinguish between different categories of aliens with temporary visas, Florida has failed to examine the unique status of Cuban-Haitian Entrant. Respondents attempt to describe petitioners as merely parolees (Res.Br., 9). The ordinary parolee is admitted to the United States only pending a hearing to determine the legal right to remain in the country.

Petitioners, as Cuban-Haitian Entrants, are not ordinary parolees. Their right to remain indefinitely was decided and decreed by presidential directive. Florida has no legitimate reason for treating these permanent residents any differently from other permanent residents.

federal law. Respondents are making just such an impermissible assertion of state authority by defining, differently from federal law, the legal capacity of Cuban-Haitian Entrants to permanently reside in Florida. (5)

The decision also conflicts with *Vlandis v. Kline*, 412 U.S. 441 (1973), as modified by *Weinberger v. Salfi*, 422 U.S. 749 (1975), which established that it is a violation of due process for a state to deny a person the opportunity to show facts that would demonstrate they meet the test of permanent residence. Petitioners' application for Florida's homestead tax exemption was denied solely on the basis of their lack of a permanent resident "green card" (P.A. at A20). Petitioners were not allowed to rebut the presumption that without a "green card" they could not form a good faith intent to reside in the state on a permanent basis. Petitioners, however, qualified as permanent residents under each of the criteria applied to all other Florida homeowners under Sections 196.012 and 196.015, Florida Statutes (1983) which define permanent resident for purposes of the homestead exemption. See Petition for Writ of Certiorari at 4-5 (6)

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(5) Respondents' attempt to distinguish *Elkins* and *Toll* (Res. Br. at 10-11) is devoid of substance since the rule of Maryland's university barred all non-domiciles, alien and non-alien, but only aliens without "green cards" were found barred because they allegedly could not form the intent to become permanent residents. Petitioners face the same rule.

(6) Respondents do not deny that Florida has established an irrebuttable presumption that only aliens with "green cards" can establish permanent residence in Florida (Res. Br. at 12) and instead argue again their mistaken view of federal immigration law in an attempt to validate the presumption.

Petitioners have thereby been denied due process of law.

Point IV.

Respondents Misperceive The Standard Of Review Applicable To Classification Based On Alienage.

Respondents are completely mistaken in their view of the permissibility of state laws that discriminate on the basis of alienage. This court in its most recent examination of this question stated the following:

> As a general matter, a State law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny. In order to withstand strict scrutiny, the law must advance a compelling State interest by the least restrictive means available.

Bernal v. Fainter, — U.S. —, 104 S.Ct. 2312, at 2316 (1984).

Even in those limited areas where this Court has drawn a narrow exception, particularly employment in political positions intimately related to the process of democratic self government, aliens are at a minimum a semi-suspect class. State laws that fall within the narrow limits of this exception are subjected at a minimum to intermediate scrutiny. *Cabell v. Chavez,* 454 U.S. 432 (1982); *Ambach v. Norwick,* 441 U.S. 68 (1979); *Foley v. Connelie,* 435 U.S. 291 (1978). See also *Examining Board v. De Otero,* 426 U.S. 572 (1976); *Sugarman v. Dougall,* 413 U.S. 634 (1973); *In Re Griffiths,* 413 U.S. 717 (1973); *San Antonio School District v. Rodriguez,* 411 U.S. 1 (1973); *Graham v. Richardson,* 403 U.S. 365 (1971); *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948); *Hines v. Davidowitz,* 312 U.S. 52 (1941); *Truax v. Raich,* 239 U.S. 33 (1915).

This Court has held that aliens, whatever their immigration status, even those here unlawfully, are 'persons' and as such entitled to due process and equal protection of the law as guaranteed by the Fifth and Fourteenth amendments to the constitution *Plyler v. Doe,* 457 U.S. 202 (1982).

Respondents seem to arrogate to the state of Florida power to make distinctions among aliens, which is vested exclusively in the federal government. *Mathews v. Diaz, supra.*

CONCLUSION

For all the foregoing Reasons and the reasons set forth in the Petition for Writ of Certiorari, this Court should grant the writ of certiorari and review the judgment of the Florida Court.

Respectfully submitted

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